No. 15,354

United States Court of Appeals

For the Ninth Circuit

A. E. Stokes and Estelle Stokes,
Appellants,

vs.

James H. Reeves and Isham P. Nelson, Jr., doing business as Reeves and Nelson,
Appellees.

Appeal from the United States District Court for the District of Montana, Billings Division.

BRIEF OF APPELLANTS.

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STATEMENT OF THE CASE.

Appellees, James H. Reeves and Isham P. Nelson, Jr., doing business as Reeves and Nelson, brought this action in the United States District Court for the District of Montana against A. E. Stokes and his wife Estelle Stokes. The theory of the action was an account stated in the amount of $3,038.22 for professional services rendered (R 35).

Jurisdiction of the lower Court was founded on diversity of citizenship and amount in controversy (R 3). A. E. Stokes answered with a general denial, a second defense

of an oral contract in the total amount of $1,500.00 and a third defense of lack of jurisdiction of the Court (R 6). Estelle Stokes filed a general denial, a second defense of payment in full for professional services rendered to her and a third defense of lack of jurisdiction of the Court (R 8).

The case was tried to the Court without a jury on December 5, 1955, before the Honorable Charles N. Pray, United States District Judge at Billings, Montana. Judgment was entered on September 4, 1956, in favor of the plaintiff in the amount of $2,000.00 with interest, attorney's fee and Court costs (R 9, 10). It is from this judgment that the appeal is prosecuted.

Appellees' only witness James H. Reeves testified that during April 1952 A. E. Stokes engaged him to do audit work and file income tax returns for Stokes and his first wife (Evelyn F. Stokes) and his second wife Estelle Stokes (R 20, 21, Pl. Ex. 1 R 26-29). On September 15, 1952, the plaintiffs received a payment of $250.00 on account (R 22, Def. Ex. 2 R 38, 63) in the form of a check made by Estelle Parker, Stokes' second wife.

Reeves completed the returns on April 3, 1953 (R 22) and rendered a detailed statement of account to the defendants on that date in the amount of $2,627.50 (Pl. Ex. 4 R 56, 57). During July, 1953, Reeves amended the statement of April 3, 1953 to include $400.00 "Telephone Calls" and $10.72 "Travel Expenses" making a total balance due of $3,038.22 (R 23, Pl. Ex. 1 R 26-29). On August 14, 1953, plaintiff brought an action in the United States District Court for the Northern District of Texas for the recovery of $3,038.22 (R 39-47, Def. Ex. 3) which

was dismissed prior to the bringing of the instant action (R 48, 49).

Reeves stated Estelle Stokes never asked me to do anything for her (R 58). However, her 1951 and 1952 U.S. Individual Income Tax Returns were prepared (R 51, 58, Pl. Ex. 1 Items 10 and 12 R 27).

An estimate of $300.00 per year for the seven years involved was made in April, 1952 by Reeves for the work to be done (R 47). Reeves denied that any deal as to total value of the services was made during September 1952 (R 48) or September, 1953, after the Texas suit was brought (R 48) or by telephone in November, 1953 (R. 49).

Plaintiff testified that he personally handed the statement of April 3, 1953, to Stokes (R 55) and that he mailed the statement of July, 1953, postage prepaid to A. E. Stokes, P.O. Box 276, Sidney, Montana, (R 22-24) and it was not returned (R 24).

Appellant here, defendant Estelle Stokes, testified that her name previous to her marriage on August 11, 1951 to A. E. Stokes was Estelle Parker (R 59); that Defendants' Exhibit No. 2 (R 63) was payment for preparation of her tax returns for 1951 and 1952 (R 61, Pl. Ex. 1 Items 10 and 12 R 27, 28, Note: Items 2, 4, 6 are for Evelyn F. Stokes, first wife of A. E. Stokes R 20); that she did not know Mr. Reeves (R 65) but she authorized her returns to be prepared (R 69).

Testimony of A. E. Stokes was that during the summer of 1951 he turned over his books and records to Reeves to prepare tax returns for the years 1946 through 1952

(R 78); that on September 9, 1952, Reeves said the total charges would be $1,750.00 (R 79), that is $250.00 per year for seven years (R 80) whereupon Stokes filled out and gave Reeves the check of Estelle Parker (Estelle Stokes) in the amount of $250.00 for her share of the services (R 81, 83, 63); that on this date, September 9, 1952, both Reeves and Nelson agreed to the deal (R 81, 82). Stokes concedes that he owes Reeves and Nelson $1,500.00 (R 84). It is related by Stokes that Reeves did not give him a statement on April 3, 1953 (R 100, 101) and that he did not receive a statement at Billings, Montana during July 1953 (R 102).

After Reeves and Nelson sued Stokes in Texas on August 14, 1953, Stokes went to Dallas to see them (R 86) and asked why the bill had been padded from the original agreement (R 86, 87). Reeves stated that it was raised because Stokes hadn't paid anything and the firm had big expenses and a barren oil well (R 87). Reeves also wanted his attorney Griffis to represent both sides of the Texas law suit (R 87, see also Reeves' testimony R 118). Stokes obtained his own counsel and was successful in having the Texas action dismissed in early December 1953 (R 89). Immediately thereafter, Reeves and Stokes agreed by telephone to go back to their original agreement of $1,500.00 (R 89).

ARGUMENT.

I. THE DISTRICT COURT SHOULD HAVE DISMISSED THE ACTION BECAUSE OF LACK OF JURISDICTIONAL AMOUNT IN CONTROVERSY.

It does not take any stretch of imagination to determine on the record from their own evidence how the appellees were able to allege proper jurisdictional amount in controversy exceeding $3,000.00 in order to file their action in the Federal Court. After appellees completed their accounting work they prepared a detailed statement of account dated April 3, 1953, showing a balance due of $2,627.50, however, within thirty days before they brought the action in the Texas Federal Court (identical with the action here) the account was amended by an additional $400.00 telephone expense and $10.00 travel expense without changing anything else including the date of the statement to bring the balance to $3,038.22 (Compare Pl. Ex. 1, R 26 with Pl. Ex. 4, R 56). It should also be noted that plaintiffs' evidence in the Court below is completely lacking in any proof of telephone expense in order to prove sufficient amount in controversy.

Manifestly, such action to obtain jurisdiction in the United States District Court was not in good faith and should not be permitted, it is a fraud upon the Court.

> "* * * if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.
>
> "* * * good faith in choosing the Federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if

> from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit. Indeed, this is the court's duty under the Act of 1875."
>
> *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845.

In *North Pacific SS. Co. v. Soley,* 257 U.S. 216, 42 S.Ct. 87, 66 L.Ed. 203, the Supreme Court of the United States lays down the rule that it is the duty of the Federal District Court, when it appears that a suit does not really and substantially involve the necessary amount, of $3,000.00 or more, exclusive of interest and costs, to give it jurisdiction, to then dismiss the suit, and that a District Court may so do whether the parties raise the question of jurisdiction, or not.

Since the finding was made by the lower Court that only $2,000.00 was due by defendants (appellants here) then it was that Court's duty on the basis of the transcript of evidence to sustain defendants' defense as to lack of jurisdiction of the Court and dismiss the action, and in any event there was no evidence produced at the trial to validly support an amount due in excess of $3,000.00.

Each of the defendants below affirmatively plead the defense of lack of jurisdiction. This raised an issue of fact on which plaintiff had the burden of proof. *Food Fair Stores v. Food Fair,* C.A. 1, 177 F. 2d 177; *Electro Therapy Corporation v. Strong,* C.C.A. 9, 84 F. 2d 766; *Alexander v. Westgate-Greenland Oil Co.,* C.C.A. 9, 111 F. 2d 769.

II. THE JUDGMENT RENDERED FOR AN ACCOUNT STATED IS NOT SUPPORTED BY THE RECORD.

There is no question but what appellees relied on the theory of an account stated in this action (R 35). The proof adduced by appellees was that appellants impliedly agreed to the account by not paying or protesting and therefore offered no proof as to the items aggregating the total account. If appellees were able to recover at all, the only issue in the case was whether judgment would be for the total account claimed or $1,500.00 as admitted by A. E. Stokes as the amount due. The Court erred in finding a middle-of-the-road amount for judgment since there is no evidence to support nor any issue which could be resolved in a judgment of $2,000.00. If it was determined that A. E. Stokes received the April 3, statement of account, it might be possibly found that he by retaining it and not protesting the amount he impliedly consented to such billing. However, if that were true, the jurisdictional amount in controversy would not be sufficient to sustain the jurisdiction of the Court. The record affirmatively shows that A. E. Stokes protested the alleged sum of $3,038.22 in approximately thirty-one days after he was alleged to have been billed. The matter arose by way of Texas law suit and it required a trip by Mr. Stokes from Billings, Montana to Dallas, Texas. Certainly that was no agreement or implied assent to an alleged account stated.

It is settled law (a) that failure to pay a rendered account raises only at best a rebuttable presumption of assent to the account, and (b), that failure to pay an account is explained away by showing that the only account between the parties is different from the one billed. See 1 *C.J.S., Account Stated,* pp. 716 and 717, and cases.

Here it is claimed by the defendants that an agreement was made, in the fall of 1952, by the defendant, Mr. Stokes, with the plaintiffs, that fixed the compensation of the plaintiffs at a sum less than the amount covered by either of the two bills which the plaintiffs claim to have rendered in 1953, so that, in the nature of things, there was here no assent by either defendant, implied or otherwise, to the account set forth in the bill they contend was mailed out in 1953. Thus, the consent required under the law to create an account stated in the case at bar is wholly lacking and specifically denied prior to the date the account was rendered. But, furthermore, in *Thomasma v. Carpenter,* 175 Mich. 428, 141 N.W. 559, Ann. Cas. 1915A, 690, the rule is laid down that the doctrine of an account stated does not apply to a claim that an express contract exists to pay a plaintiff a specified sum for services, such a claim being in no sense an account. In the note to the Ann. Cas. 1915 reference, supra, it is said, upon authority, that the breach of a simple contract cannot form the basis of an account stated. See also 1 *C.J.* p. 696, where it is said by the author, citing cases, that the rule that assent to an account will be implied from the retention of the account without objection does not apply when the claim is subject to a special contract with which the account is at variance. The defendants herein stand flatly upon the doctrine of these authorities.

Under the statutes of Montana, the burden of proof in this case is upon the plaintiffs. Thus Sec. 93-1501-1, R.C.M., 1947, provides that:

> "The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden

> of proof lies on the party who would be defeated if no evidence were given on either side."

And Sec. 93-2001-1, R.C.M., 1947, in paragraph 5 thereof, provides:

> "That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence."

In connection with these Montana statutory provisions, the attention of the Court is invited to the following controlling decisions: Thus, in *Putnam v. Putnam,* 86 Mont. 135, 282 Pac. 855, the Court has the following to say:

> "The party holding the affirmative of the issue must produce evidence to prove it. * * * In civil actions where the evidence is conflicting, judgment must go in favor of the party who has the affirmative of the issue, provided he produces in favor of that issue a preponderance of the evidence. * * * Where the evidence as to any fact essential to plaintiff's right of recovery, and as to which the burden rests upon him, is evenly balanced or in equilibrium, judgment must go for the defendant."

In *Flaherty v. Butte Elec. Ry. Co., et al.,* 42 Mont. 89, 111 Pac. 348, the Court relates that in civil actions, where the evidence is conflicting, a preponderance of the evidence is the least that will support a verdict.

And in *Northwestern Elec. Co., et al. v. Federal Power Commission,* decided by the Circuit Court of Appeals for the 9th Circuit, and reported in 134 F. 2d 740, the Court has the following to say:

> "The 'burden of proof' in the sense of 'persuasion' is meaningless unless it is also said how strongly a person must be persuaded. For example, if it is said that a person must be persuaded by not less than a 'preponderance of evidence' is meant that such evidence is 'evidence of greater convincing force.' "

It is also settled law under *U.S.C.* 28, Sec. 1652, that the law of Montana shall be the rule of decision here in this civil action.

III. JUDGMENT SHOULD HAVE BEEN RENDERED IN FAVOR OF THE DEFENDANT ESTELLE STOKES AND AGAINST DEFENDANT A. E. STOKES, IN THE AMOUNT OF $1,500.

The evidence in this case clearly shows that Estelle Stokes should have had judgment in her favor. She had two income tax returns prepared and paid $250.00 for such services. There is no support in the record for the trial Court to find her jointly and severally liable for $2,000.00 in its judgment.

Plaintiffs' evidence in the trial Court did not support the amount they prayed for (Plaintiffs' Complaint R 3, Judgment R 9). They offered no evidence to support a Judgment for a lesser amount. Defendant Stokes admitted he owed $1,500.00 and on all the evidence it was the duty of the trial Court to enter judgment against him for either the $1,500.00 or the amount prayed for. It was error for the Court not to enter judgment for one of those two amounts if the evidence supports any judgment as against A. E. Stokes.

It was also erroneous for the Court to enter judgment in the amount of $400.00 for attorney's fees under the

Statutes of Texas, Volume 7, Vernon's Civil Statutes of the State of Texas, Annotated, page 219 (R 31). The judgment is based on an account stated, and the place of stating the account was Montana. *Restatement of Conflict of Laws,* Section 322. Montana has no such statute for attorney's fees, so it was therefore erroneous to allow such recovery under a Texas statute.

Dated, March 13, 1957.

Respectfully submitted,
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